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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

CALUMET GRAIN AND ELEVATOR COMPANY, *Appellant,*

vs.

CITY OF CHICAGO, *Appellee.*

135

Appeals from the Circuit Court of the United States, for the Northern District of Illinois, Northern Division.

DAVID HARK CUMMINGS AND GRACE DUNLAP KENNEDY, *Appellants,*

vs.

CITY OF CHICAGO, *Appellee.*

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BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

CHARLES M. WALKER,
Corporation Counsel.

HENRY SCHOFIELD,
Solicitor for Appellee.

Chicago Legal News Co., Printers, 109-111 Clark St.

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STATEMENT.

It having been agreed that the above entitled cases shall be argued together, the brief and argument for the City of Chicago, sole defendant and appellee in both cases, are contained in this one document.

November 8, 1900, said Cumings and Kennedy filed their bill against the City of Chicago in the Circuit Court of the United States for the Northern District of Illinois.

Eight days later, November 16, 1900, the said Calumet Grain and Elevator Company filed its bill in the same court against the City of Chicago, and against said Cumings and Kennedy. The reason stated for making said Cumings and Kennedy defendants is, that they refused to join as complainants with the said Calumet company. But the record in said Calumet case shows that no effort was made to bring said Cumings and Kennedy into court; no process was issued against or served upon them; neither appeared, nor did either file any pleading in that case.

November 19, 1900, said City of Chicago filed a general demurrer to the bill of said Cumings and Kennedy, and February 8, 1901, said city filed a general demurrer to the bill of said Calumet Company.

The sole cause of demurrer assigned by the city in each case was want of equity apparent on the face of the bill.

February 8, 1901, the court below entered an order in each case denying a motion for a preliminary injunction.

May 14, 1901, the court below entered a decree in each case sustaining the demurrer filed by the city, dismissing the bill out of court "for want of equity," and awarding the city its costs.

An appeal was prayed to this court in each case and allowed.

Cumings and Kennedy, named as defendants in the bill of the Calumet Company, did not join in the prayer of that company for an appeal, and no reason is stated why they did not. Cumings and Kennedy are in this court only on appeal from the order dismissing their bill in their case,

with which case the Calumet company had, and has, no connection.

The only errors assigned, and they are the same in both cases, are: *First*, in sustaining the demurrer of the defendant, City of Chicago, and, *second*, in entering the final decree dismissing the bill for want of equity, and decreeing that complainants pay the defendant its costs.

There is nothing in either record to show upon what precise ground the court proceeded in dismissing the bills, except the statement in the decrees themselves, that the dismissal was "for want of equity."

Said Cumings and Kennedy are citizens of Illinois. Said Calumet Company is a private corporation, created by the State of Illinois, and said City of Chicago is a municipal corporation created by the same State.

It is apparent that the jurisdiction of the court below, as a Federal court, can rest only on the ground that the bill in each case states the case of a suit of a civil nature, at law or in equity, arising under the Constitution, or laws, of the United States, involving over $2,000, exclusive of interest and costs, of which the State courts had concurrent jurisdiction, within the meaning of section 1 of the judiciary act of 1888.

It is believed that it is quite apparent from the averments in each bill, that the only Federal question which either case *could* fairly present, is the question whether an ordinance of the city of Chicago, making it unlawful to rebuild a dock in the Calumet river, unless upon a permit issued by the head of the department of public works of said city, so *collides* with section 10 of an act of Congress, approved March 3, 1899, making it unlawful to rebuild a dock in said

river, except upon plans recommended by the chief of engineers of the United States, and upon authority of the Secretary of War, that the ordinance must give way, in obedience to section 2 of article VI of the Federal Constitution, making all laws of the United States, made in pursuance of that Constitution, the supreme law of the land, and that this question could arise, if the cause of action attempted to be stated in each bill were properly stated, only in reply to a *defense* based on said ordinance.

Cumings and Kennedy, as heirs-at-law and devisees under the will of one Columbus R. Cumings, own in fee a parcel of land in the city of Chicago, county of Cook, State of Illinois, abutting on the Calumet River. The side abutting on the river is 480.6 feet long.

At the date of the filing of the bill by said Cumings and Kennedy, there was a dock along the entire length of the river side, or front, of their said lot. Cumings and Kennedy propose to rebuild this dock, and to extend it out into the river to the line marked "Proposed Dock" on the "Plat of Proposed Dock" forming part of Exhibit B of their bill. (Printed Record, No. 373, opposite p. 12.)

The Calumet Grain and Elevator Company owns in fee a parcel of land adjoining on the south said parcel owned by said Cumings and Kennedy and this parcel also abuts on the said Calumet river. The river side, or front, of the lot owned by the Calumet Company is 300 feet long. Said company proposes to rebuild the dock existing along this 300-foot line, and to extend the dock out into the river to the line marked "Proposed Dock" on the plat forming part of Exhibit A of its bill. (Printed Record, No. 372. Plat of Proposed Dock, opposite p. 14. It is probably uncertain

from the said plat alone whether at the date of filing the bill, the Calumet Company had a dock along the river line of its lot, but the bill makes it clear that there was a dock there, see No. 372, pp. 7–8.)

It is claimed, in the written brief and argument filed on behalf of appellants, that Cumings and Kennedy, own *the submerged soil* opposite to, and in front of, their lot, and that the Calumet Company owns *the submerged soil* opposite to, and in front of, its lot, upon which two parcels of submerged soil the proposed dock extensions will rest.

It appears from the bill of the Calumet Company, that, May, 1895, it acquired from Columbus R. Cumings title to *a part* of block 108 of a subdivision made by the Calumet and Chicago Canal and Dock Company (Printed Record in No. 372, p. 4, top, p. 3). The part of said block 108 acquired, and owned, by the said Calumet Company, is described in its bill by metes and bounds, showing that the said company acquired and owns a definite, fixed quantity and extent of land. The description does not call for the Calumet river as a boundary, but makes the water line on the west bank of that river a boundary. The description of the boundary on the river side of the lot is as follows: "*Thence in a northeasterly direction along the east line (or water line) on the west bank of the Calumet river, for a distance of 300 feet, to a point*; thence in a southwesterly direction *for a distance of 193.09 feet* to the place of beginning. (Printed Record in No. 372, p. 3, just below middle of page, and see "Plat of Proposed Dock," opposite p. 14.)

There is no flat averment in its bill that the said Calumet Company owns said submerged soil. Ownership of said submerged soil is averred only as a consequence of, or

incident to, ownership of the part of block 108, previously described. The averment is: "That your orator, *as the owner* of said portion of said block 108, *is also* owner of the land under the water of the said stream, opposite to, and in front of, said portion of said block 108, up to the center line thereof, * * * save and except." (Printed Record in No. 372, p. 3, near bottom of page.)

Nor in the bill of Cumings and Kennedy, is it averred flatly, that they own the submerged soil in front of their lot. The averment in their bill upon this matter is exactly the same as that just adverted to in the bill of the Calumet Company. After averring ownership of a particularly described portion of said block 108, it is averred that, *as owners* of said portion of said block, said Cumings and Kennedy *are also the owners* of said submerged soil. (Printed Record in No. 373, p. 3, just above middle of page.)

This averment, as to the source or basis of their ownership of said submerged soil, would appear, of itself, to exclude such submerged soil from the land included in the previously given description of the portion of said block 108 owned by Cumings and Kennedy.

Moreover, it is impossible to affirm, from the description given of the portion of said block 108 owned by said Cumings and Kennedy, that such portion includes said submerged soil.

The bill states, that Cumings and Kennedy, as heirs-at-law and devisees under the will of Columbus R. Cumings, are the owners of the following described premises, namely: "Block 108 in the subdivision made by the Calumet & Chicago Canal & Dock Company of parts of fractional sections 5 and 6, township 37, north of range 15, east of the third

principal meridian (a plat of which subdivision was recorded in the recorder's office of Cook county aforesaid, on the 17th day of January, A. D. 1874), excepting therefrom," three described parcels, the last excepted parcel described being the parcel owned by said Calumet Grain and Elevator Company.

The plat of the subdivision referred to in this description of the land owned by Cumings and Kennedy, is a part of the description, and the essential and vital part of it, but the plat is not in the record anywhere.

It is entirely probable that, if the omitted portion of the description, to wit, the plat of the subdivision, were produced, it would appear that the subdivider, the Calumet and Chicago Canal and Dock Company, in making and recording the plat, in the subdivision, either annexed this submerged soil to some other block or lot or conveyed such submerged soil to the municipal corporation in which the land subdivided lay, in trust for the use of the public as a way.

Moreover, the averment "that said block 108 fronts to the east upon the stream known as the Calumet river," taken in connection with the averment just following that, *as owners* of said portion of block 108, complainants *are also owners* of said submerged soil, may mean, and perhaps, as against the pleader, must mean, that block 108 stopped at the water's edge, and includes no part of the soil covered by the water.

For the reasons given, it is believed, that it must be taken as a fact, in the Calumet Company's case, that that company *does not own* the submerged soil on which it proposes to build; that that soil, constituting the *locus in quo*

of the case, belongs to some other person not disclosed by the record.

It is believed also, that it must be taken as a fact, in the case of Cumings and Kennedy, that the submerged soil, constituting the *locus in quo* of their case, *does not belong* to them, but belongs to some other person not disclosed by the record in their case.

So far as the record in each of these cases is concerned, the question of the ownership by appellants of the *locus in quo* is in no way affected by the deed of their predecessor in title, Columbus R. Cumings, to the United States, dated January 5, 1888, nor by the deed to the United States, by the Burdicks, dated November 3, 1886, from whom said Columbus R. Cumings afterwards acquired part of said block 108, nor by the similar deeds made to the United States by owners of land abutting on the Calumet river within the limits of the plan of the United States for deepening and widening that river. Neither the Cumings deed nor the Burdick deed affects or concerns the *locus in quo* in these two cases. They touch and concern only that part of the bed of the river which lies on the other, or west, side of the line marked "Government Channel Line" on the "Plat of Proposed Dock," attached to the two bills as part of Exhibit B in one case and Exhibit A in the other. The *loci in quo* are east of that line.

The plan of the United States for improving the Calumet river evidently required the actual taking of land at certain points for widening the river. The deepening of a river always endangers buildings and land along the banks of the river by depriving them of their lateral support. The main purpose of the deeds evidently was to protect the

United States from claims for damages for land taken and land damaged in prosecuting the work. What effect, if any, these deeds to the United States may have had on the title to the bed of the river between the Government channel lines is neither material nor determinable, on these records. (Printed Record in No. 372, pp. 4–6; in No. 373, pp. 3–6.) The averments as to the improvement of the river by the United States, and as to the deeds taken from abutters, are identical in the two bills, except that the maps, Exhibits A and A½, between pp. 10 and 11, in No. 373, the Cumings-Kennedy case, are not annexed to the other bill and form no part of that bill.

If the records, in these two cases, do not show ownership in appellants of the land on which they proposed to build, the two cases fail, there being no averment that the real owner has consented to the proposed building.

If the record in *only one* of these cases does not show ownership of such land in the complainants therein, that is fatal to the *two* cases. It is fatal to the case in which such ownership is shown, because of section 10 of the act of March 3, 1899. The only permit issued under that act was to build on *both parcels* according to plans approved. No permit was ever issued to build on *one parcel*, and no plans for a dock on one parcel have ever been approved.

Each one concedes, that under section 10 of said act, it would be unlawful in complainants to build as proposed, even if they owned the soil on which the dock extensions would rest, without a permit from the Secretary of War and plans approved by the chief of engineers.

Have Cumings and Kennedy, complainants in one bill, and has the Calumet Grain and Elevator Company, com-

plainants in the other bill, any permit from the Secretary of War to do what they respectively propose to do?

The only permit in either record is a permit issued May 12, 1900, to two persons jointly, viz.: D. M. Cumings, as executor, *and* the Calumet Grain and Elevator Company, to re-build *the dock* in front of part of block 108 along the lines shown on plans attached to the permit, and recommended by the chief of engineers. (Printed Record, in No. 372, pp. 13–14; in No. 373, p. 12.)

How can a permit to *two persons jointly* to do *a specified work* according to certain plans, constitute a permit to *each* of *said persons severally*, to do *a part* of the work?

The chief of engineers has never approved or recommended plans for separate docks in front of the parcels of land owned by these complainants respectively.

These complainants should have joined in one suit.

Their theory appears to be, that they can split the permit in two, split the plans in two, and split the work in two, because they think they own in severalty the parcels of land upon which the dock recommended and authorized will rest. Section 10 of the Act makes no mention of land, nor does the permit. On this theory, if a permit were issued to a contractor for a wharf for a lineal distance of a mile along the margin of the Calumet River, the wharf could be built in some places and not built in other places according to the fancies of the abutting owners.

Let it be assumed, however, that appellants own the land on which their proposed dock extensions will rest, and that they have the recommendation of the chief of engineers

and the authority of the secretary of war, required by section 10 of said Act; what has the city of Chicago done?

Each bill avers that the complainants therein entered into a several "contract with certain contractors for the furnishing of material and the building of said dock in front of their premises in accordance with said permit, and along the lines shown by said plan attached to said permit, and caused every preparation to be made for the speedy prosecution of said work, and * * * about the 15th day of October, 1900, entered upon said work, and were engaged in the prosecution thereof by their contractors and agents, when the city of Chicago, by its police and its officials and agents, by force and by threats of arresting the men engaged in said work, put a stop to it, asserting that no permit for the building of said dock had been issued by it, or by its agents or officers, and that such work could not be prosecuted unless a permit therefor should be issued from the department of public works of said city * * * and that said city of Chicago asserted and claimed the right to put a stop to said work and to prevent those who were engaged in it from continuing therein, because no permit had been issued from its department of public works, under certain ordinances, which had theretofore been passed by its city council, and which purported to prescribe that it should be the duty of the harbor master of said city to require all parties who should be engaged in repairing, renewing, altering, or constructing any dock within the city of Chicago to produce such permit, and in default of the production thereof to cause the arrest of such parties so engaged in such work, and to cause the removal of such dock." Afterward, however, the "city engineer of said city, who was and is the officer in the department of public works of

said city, who has supervision and charge of the building of docks within the city of Chicago, agreed with your orators that the city had no power or authority to interfere with or prevent the building of said dock by your orators, after it had been approved and authorized by the secretary of war in accordance with the provisions of said Act of Congress, approved March 3, 1899, and agreed that said work should not be interfered with by the city or its agents. * * * Thereupon your orators, by their agents, immediately renewed said work and were actively engaged therein, when, on the 29th day of October, A. D. 1900, they were again stopped by the said city of Chicago through its police, and their contractors and agents and servants were forced to discontinue said work, and were threatened with arrest and violence if they should attempt to continue further with said work." "Officers and agents" of the city have notified "your orators" that the police of said city "will forcibly prevent the building" of said dock, "and will arrest those who shall be engaged in doing such work and will remove any dock so built."

The substance of the wrong alleged is, that the police of the city of Chicago stopped the work, and threaten to arrest the men engaged in it if the work be resumed, the police claiming the right to stop the work and to make arrests under ordinances of the city.

These threats of arrest by the police under authority of the city ordinance are alleged to invade rights secured to orators by the *Fifth* (?) Amendment of the Federal Constitution and by the laws of the United States, particularly said law of March 3, 1899.

The prayer of each bill is for an injunction against the

threatened arrests, and for a decree that orators have the right to build said dock under acts of Congress and the permission of the secretary of war, and that the city of Chicago has no power or authority to interfere. (Printed Record in No. 372, pp. 9-13; in No. 373, pp. 8-10.)

On the averments of the bills, the threatened arrests, if made, would constitute torts, for which actions on the case for false arrest and imprisonment would lie. The declarations in such actions would state nothing in regard to acts of Congress or ordinances of the city of Chicago, or the Constitution of the United States. The Constitution of the United States, if it properly could come in at all, and the acts of Congress, would appear first in such actions at law in replications to pleas setting up the city ordinances as a defense.

Clearly such actions at law would not be suits arising under the Constitution or laws of the United States.

How, then, can these suits in equity seeking redress for identically the same wrongs that would be involved in such actions of trespass, be said to arise under the Constitution or laws of the United States? While in form there is no such thing in equity pleading as a special replication, there is such a thing in substance, the bill containing within itself all the series of pleadings used by a plaintiff in actions at law. If the city of Chicago should answer, and in its answer did not rely on the ordinances referred to in the bill, none of the Federal questions foreshadowed in the bill could arise by any possibility. If complainants have the permit required by the act, their case or *suit* does not present a question, even as to the proper construction or application of any Act of Congress.

It should be observed that neither bill sets forth the ordinances of the city of Chicago under which the police claimed the right to stop the work, and threaten arrests. Neither bill sets forth, even the substance or legal effect of the ordinance; but only the substance or legal effect *claimed for them by the police*. What a policeman *says* about an ordinance, and what the ordinance actually *is*, may be different.

The Fourteenth Amendment is prohibitory of State action. Can it reasonably be said on these records, that these policemen were acting under the shield of the State of Illinois by her authority?

Appellants' theory of their cases appears to be, that a permit of the secretary of war issued under section 10 of the Act of March 3, 1899, *creates*, or at least, *secures*, a right in the holder of the permit to do the thing permitted.

But the theory seems wholly untenable. Section 10 is prohibitory. It presupposes an existing right in the holder of the permit, derived from some source other than an act of Congress, to do the things, and restrains, limits or regulates the exercise of the right.

The question whether this theory be tenable or not can not arise out of either case at bar, because complainants have no permit to build and no land to build on, and hence no right either created or secured by the act of Congress.

But even if the theory that section 10 creates or secures a right in the holder of a permit, and even if each bill shows the complainants therein to be holders or owners of rights so created or secured, any action in the Federal courts to secure redress for deprivation of such right should be in the District Court, and not in the Circuit Court.

The wrongs complained of in these bills, actual and threatened, being purely legal, and the appropriate tribunal for their redress being a court of law, does either bill show any special reason for the interference of a court of equity?

The Calumet Grain and Elevator Company says it does a big business, has a big elevator on its lot, and ships and receives large quantities of grain over the Calumet river, and that its proposed extension of dock "is necessary to the economical conduct of the said business and commerce with states other than Illinois and with foreign countries;" said company fears "that any attempts on its part to commence or prosecute said work will necessarily be futile and will lead to breaches of the peace and conflicts between the men engaged in said work and the police of the city of Chicago," and avers "that the said action of the city of Chicago in preventing your orator from building its said dock is materially interfering with and impeding the prosecution by your orator of its said business and commerce with states of the United States, other than Illinois and with foreign nations." (Printed Record in No. 372, p. 9, p. 10.)

The building of a dock is not interstate commerce, and stopping the building of a dock is not stopping interstate commerce; particularly where an existing dock accommodates fully such a vast business. Nor has a court of equity general jurisdiction to clear the way for interstate commerce.

It should be observed that it is clear, from the information contained in each bill as to the ordinance under which the police of the city claimed to act, that it is a police regulation, penal in its character, and authorizing arrest and im-

prisonment for its violation. It is a criminal law of the city of Chicago, the enforcement of which a court of equity of the United States is asked to stop.

It is believed that the bill of Cumings and Kennedy contains not a single averment which would give a court of equity jurisdiction. So far as appears their land is vacant, and no business is done on it. They do fear, that if they attempt to go on with the work the attempt will be futile and will lead to breaches of the peace; thus in one sentence admitting and denying the efficiency of the police of the city of Chicago. (Printed Record, in No. 373, p. 10 top).

Each bill states that "the Calumet river is a navigable stream, having its natural outlet into Lake Michigan, and forming at its mouth what is known as the harbor of South Chicago, in said city of Chicago, and that it is one of the navigable waters of the United States," and interstate commerce is carried on over it; that in its natural and unimproved condition, said river was navigable for only small vessels and for only a short distance above its outlet into Lake Michigan, but that it has been improved by the United States, and its channel lines have been established and its channel deepened and broadened. (Printed Record in No. 373, p. 3; in No. 372, p. 4.) The part of the river on which appellants' lands abut is in the city of Chicago. (Printed Record in No. 373, p. 8; in No. 372, p. 10.)

It should be observed that the proposed dock extensions, if made, will lie wholly within, or west of, the channel line of the United States, and that section 10 of the Act of Congress is applicable, in so far as it requires a permit from the secretary of war, only when wharves, etc., are to be built

"outside established harbor lines, or where no harbor lines have been established."

In neither bill is it averred that these dock extensions will not obstruct either interstate or intra-state commerce. Nor is it shown how it happens, if the river in its natural state was navigable only for small vessels, the Calumet Company is able to load grain from its elevator into vessels at its present dock. (Printed Record in No. 372, p. 9.) Who deepened the river inside the government channel line in front of these docks?

As already stated, the appeal in each case was taken direct to this court.

Brief and Argument.

FIRST.

The Circuit Court, as a Federal Court, had no jurisdiction.

The jurisdiction can not rest on section 1 of the Judiciary Act of 1888, because:

A. Assuming that each bill states a legal claim or demand, that claim, or demand, is for redress for threatened false arrests and imprisonments, and no Federal law forms any ingredient in such claim or demand, because the only questions of Federal law suggested in each bill, viz., whether an ordinance of the city of Chicago collides with an Act of Congress, or contravenes the Constitution of the United States, arise out of a special replication incorporated into each bill in anticipation of a possible defense founded on such ordinance, which possible defense each bill only suggests, or foreshadows.

If the statement of the claim, or demand, in each bill does not, in and of itself, show, that the claim, or demand, arises under the Constitution, or laws, of the United States, the fact that the defendant filed a demurrer can not aid the statement to that end.

Tennessee v. *Union and Planters Bank*, 152 U. S. 454.
Houston and Texas Central Rd. Co. v. *Texas*, 177 U. S. 66, 78, and cases cited.
New Orleans v. *Benjamin*, 153 U. S. 411, 424, 431.

B. The jurisdiction can not rest on section 629, subdivision "sixteenth," of the Revised Statutes, because said section, if in force, has no application, for the following reasons:

1. No *civil* right secured by the Constitution or laws of the United States, is involved.

Section 1979, Revised Statutes.
Holt v. *Indiana Manufacturing Company*, 176 U. S. 68.

2. The statement of claim, or demand, in each bill shows on its face that the right claimed, or demanded, is a right to build a dock in defiance of an Act of Congress, to wit: Section 10 of the Act of March 3, 1899, and in defiance of the common law forbidding trespass to real estate, because the statement of claim in each bill shows, that the claimant therein has not complied with said section 10 of said act by obtaining a permit from the secretary of war, and that the claimant therein does not own the land on which he proposes to build his dock.

A suit by a man, caught, *flagrante delicto*, violating a law of the United States, and a rule of the common law, against a policeman who caught him, and because he caught him,

is not a suit for redress for deprivation of a right within the meaning of sections 629 and 1979 of the Revised Statutes

3. Neither suit is against a "person who, under color of any ordinance of any state" * * * subjected or caused to be subjected any other person to the deprivation of rights, because the statement of claim does not show any ordinance of any state, under which the persons who stopped the building of the dock acted, and because the suit is not against those persons, but is against the municipal body that passed the ordinance, and hence neither suit is a suit "authorized by law to be brought," within the meaning of section 629, subdivision sixteenth, and 1979 of the Revised Statutes.

4. If, by any possibility, it can be said that either suit presents a claim, or demand, under section 1979 of the Revised Statutes, or presents even a question whether a claim, or demand, is made under said section, the District Court, under section 563, subdivision "Twelfth," had jurisdiction, because the only right involved would be an alleged right, alleged to be secured by section 10 of the Act of March 3, 1899, and that law is not a law "providing *equal rights*," within the meaning of section 629, subdivision "Sixteenth."

SECOND.

Even if the Circuit Court, as a Federal Court, did have jurisdiction in these cases, this court has no jurisdiction, because section 6 of the Court of Appeals Act vests the appellate jurisdiction in these cases in the Court of Appeals exclusively.

The jurisdiction of the Circuit Court could not rest on the ground that the suits arise under the Constitution of

the United States, because the attempt to draw in question the validity of an ordinance of the city of Chicago is wholly abortive, neither the ordinance itself being set forth, nor any statute of the state authorizing the passage of the ordinance being set forth, in any way whatever. The State of Illinois can not be convicted of violating the Fourteenth Amendment without allegation, or proof, approximating, at least, to a certainty.

No reason is perceived why the rule stated in *Yazoo and Mississippi Railroad Company* v. *Adams*, 180 U. S. 41, 48, on error to a state court, is not applicable.

A municipal ordinance is not a state act, unless passed under legislative authority.

Hamilton Gas Light Co. v. *Hamilton City*, 146 U. S. 258, 265–266.

This court has no jurisdiction under section 5 of the Court of Appeals Act.

Curtis' Jurisdiction of U. S. Courts, Ed. 2, pp. 67–73.

The cases are "cases other than those provided for" in section 5 of the Court of Appeals Act, and the Act of March 3, 1899, being a criminal law, section 6 of the Court of Appeals Act makes the judgment of the Court of Appeals final.

Section 6, Court of Appeals Act.

Sections 10 and 12 of Act of March 3, 1899, being law under which these cases arise.

THIRD.

The court below, as a court of equity, had no jurisdiction because the remedy at law is entirely adequate. That is,

the bills do not show that it is not. And also a court of equity will not generally stop the enforcement of a penal police ordinance.

People v. *Canal Board of New York*, 55 N. Y. 390.
Davis v. *American Society for Preventing Cruelty to Animals*, 75 N. Y. 362.
Poyer v. *Village of Des Plaines*, 123 Ill. 111.
1 Foster's Fed. Practice, Ed. 2, Sec. 215.
In re Sawyer, 124 U. S. 200.
Hackrader v. *Wadley*, 172 U. S. 166.
Fitts v. *McGhee*, 172 U. S. 531.
Osborne v. *Missouri Pacific R. Co.*, 147 U. S. 248, 258.

FOURTH.

Complainants should have joined in one bill, as, at best, they held a joint permit under section 10 of the act of March 3, 1899.

Minnesota v. *Northern Securities Co.*, 184 U. S. 199, 234, 238.

One is not a party, though named in the pleadings, unless he is brought in by process, or appears.

Terry v. *Com. Bank*, 92 U. S. 454.
May v. *Le Claire*, 11 Wall. 217.

FIFTH.

Complainants do not own the land they intend to build on.

It is conceded that it is established law in the State of Illinois, that a conveyance of land *calling for running water as a boundary* carries title to submerged land to the middle of such running water, whether the water be navigable or not.

Notwithstanding the decision of the majority of the judges in *Hardin* v. *Jordan*, 140 U. S. 371 (1890), the rule is different where the conveyance calls for *still* water, ponds or lakes, navigable or not, for a boundary.

Fuller v. *Shedd*, 161 Ill. 462 (1896).

The descriptions in the bill call for a fixed boundary or for a definite extent of land.

In *McCormick* v. *Huse*, 78 Ill. 363, the extent of land, or quantity of land, conveyed controlled.

In *Brophy* v. *Richeson*, 137 Ind. 114, meander lines and stakes controlled.

Rockwell v. *Baldwin*, 53 Ill. 19.

In *Handly's Lessees* v. *Anthony*, 5 Wheaton, 374, the words "northwest of the River Ohio," in the Virginia grant of the Northwest Territory, was held to restrict the boundary to the low water mark on the northwest bank of the Ohio river.

A plat referred to in a description is part of the description.

Henderson v. *Hatterman*, 146 Ill. 555.
Smith v. *Young*, 160 Ill. 163, 170.

Appellants are asking a court of equity to aid them to commit trespasses.

Braxon v. *Bressler*, 64 Ill. 488, a case of taking rocks from bed of a stream, held to be trespass.
Washington Ice Co. v. *Shortall*, 101 Ill. 46, taking ice found on stream held to be trespass.
Shively v. *Bowlby*, 152 U. S. 138.

SIXTH.

There is no collision between section 10 of the Act of March 3, 1899, and the ordinance of the city of Chicago.

In the absence of any National or State statute, or municipal ordinance regulating the subject, the ownership of the submerged soil, by the law of Illinois, gives only a *license* to such owner to build a *wharf* on such soil.

It has been expressly decided, that when a State parts with its title to the bed of navigable water, and thereby gives, as in Illinois, an implied license to build wharves in the bed in aid of commerce, it nevertheless retains its power to control and prohibit, in the interest of the public, the building of wharves and other structures in such bed, and does not, and can not thereby, in any way, impair, or diminish, the power of Congress, under the commerce clause, to regulate and prohibit, in the interest of interstate and foreign commerce, the use of such bed, or the police power of the state.

Prosser v. *Northern Pacific R. Co.*, 152 U. S. 59, 64–65.

Shively v. *Bowlby*, 152 U. S. 1, 40 VII.

Walker v. *Marks*, 17 Wall. 648.

Weber v. *State Harbor Com'rs*, 18 Wall. 57.

Com. v. *Alger*, 7 Cush. 53.

People v. *New York & Staten Island Ferry Co.*, 68 N. Y. 71.

State v. *Sargent*, 45 Conn. 358.

Hawkins Point Light House, 39 Fed. 77, brief for the Government.

Gould, Waters, Ed. 3, Sec. 138 and Sec. 179, at p. 349, and cases cited.

In the case of *navigable streams*, the cases in Illinois all recognize, that the *license* of a riparian owner on a navigable stream in Illinois, by virtue of his ownership of the bed in front of his land, may be regulated and prohibited by the Legislature in the interest of the public easements of navigation, etc.

Middleton v. *Pritchard*, 3 Scam. 510 (1842).
People v. *St. Louis*, 5 Gilman, 351 (1848).
Canal Trustees v. *Havan*, 5 Gilman, 548 (1849).
Illinois River Packet Co. v. *Peoria Bridge Co.*, 38 Ill. 417 (1865).
Ensminger v. *People*, 47 Ill. 384 (1868).
City of Chicago v. *Laflin*, 49 Ill. 172 (1868).
City of Chicago v. *McGinn*, 51 Ill. 766 (1869).
Rockwell v. *Baldwin*, 53 Ill. 19 (1869).
Hubbard v. *Bell*, 54 Ill. 110 (1870).
Braxon v. *Bressler*, 64 Ill. 488 (1872).
Washington Ice Co. v. *Shortall*, 101 Ill. 46 (1881).
Piper v. *Connolly*, 108 Ill. 646 (1884).

There can be no doubt, that Congress has power to *prevent* the erection of any kind of structures, constituting obstructions to navigation, over, or in, the Calumet river, the same being navigable waters of the United States, even when such structures are authorized by State law.

It is very apparent that the River and Harbor Act of 1899 is *preventive* legislation, and is not legislation designed *to grant authority*. The power of the Secretary of War is to *prevent* the erection of structures, bridges, on, over, and in, navigable waters of the United States, *if they will be obstructions*, and not *to authorize them*. The act is preventive and defensive, and it has been so authoritatively decided in

regard to the River and Harbor Act of 1890, almost the first of the acts containing these preventive, defensive regulations.

Lake Shore & Michigan Southern R. Co. v. *Ohio*, 165 U. S. 365.

See *Lane* v. *Smith*, 71 Conn. 65, 70.

The language of the Act of Congress of 1899 is prohibitory, preventive and defensive, and is not apt language to affirmatively give authority.

See sections 9 and 10 of Act.

There is no material difference between the Act of 1890, involved in 165 U. S. 365, and the Act of 1899, involved in the case at bar.

The construction of the Act of 1890, sanctioned by the Supreme Court, had previously been given by Mr. Attorney General Miller.

20 Ops. Atty. Genl. 102, 114.

If the power of the Secretary of War is exclusive of any action by the State, then the United States should bear all the expense of managing and controlling the Calumet river, and the city of Chicago should abolish its Harbor Department, and use the money spent in maintaining it for some other purpose.

Numerous decisions of the Supreme Court, from Gibbons and Ogden, 9 Wheat. 1 (1824), down (for a leading case, see *Cooley* v. *The Board of Wardens of Port of Phil.*, 12 How. 299, 1851), conceded to the States power over local matters such as bridges, quarantine, pilots, wharves, etc., in the absence of any legislation on the same subject by Congress, although the exercise of such power by the States might, and often did, incidentally affect, impede and embarrass inter-

state commerce. The policy of the recent River and Harbor Acts is, not to abrogate this State power entirely, but to control its exercise in defense of interstate and foreign commerce.

In *Sinnot* v. *Davenport*, 22 How. 227, involving the statutes of Alabama relating to pilots and pilotage in the Harbor of Mobile, Mr. Justice Nelson, for the court, said, at page 243:

"We agree, that in the application of this principle of the supremacy of an Act of Congress in a case where the State law is but the exercise of a reserved power, *the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together; and, also, that the Act of Congress should have been passed in the exercise of a clear power under the Constitution*, such as that in question," (*i. e.*, the commerce power).

For an instance of co-operation in another matter between State and Nation, see

Ex parte Siebold, 100 U. S. 371.

We believe that the construction which counsel seek to put upon the power vested in the Secretary of War by the Act of Congress of 1899, makes the constitutionality of that act, *as applied to the facts in this case*, very doubtful. Where does Congress get the power to authorize the Secretary of War to give a private person leave to put a structure of no aid at all, or, at best, of only doubtful and purely private aid, to interstate commerce, in a local harbor, and thus displace

the police power of the States, expressly reserved to them and to the people.

Article X of Amendments to Constitution.

Yeck Wo v. *Hopkins*, 118 U. S. 356.

At any rate, that the ordinances of the city and the Act of Congress are not irreconcilably in conflict would seem to be clear.

Respectfully submitted,

CHARLES M. WALKER,
Corporation Counsel,
HENRY SCHOFIELD,
Solicitors for Appellee.